JD–79–06
Philadelphia, PA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SOUTH JERSEY HEALTHCARE,

Employer

and Case 4–RC–21179

HEALTH PROFESSIONALS AND
ALLIED EMPLOYEES, AFT, AFL-CIO,

Petitioner

Henry R. Protas, Esq.
of Philadelphia, PA,
for the Regional Director.
Michael J. Wietzychowski, Esq.
(Schnader, Harrison, Segal & Lewis, LLP), of Cherry Hill, NJ,
for the Employer.
Leon B. Savetsky, Esq.
(Loccke & Correia, P.A.),
of Hackensack, NJ,
for the Petitioner.

RECOMMENDED DECISION AND ORDER ON OBJECTIONS AND CHALLENGES

ROBERT A. GIANNASI, Administrative Law Judge: Pursuant to a notice of hearing on objections to election and challenged ballots issued by the Regional Director for Region 4 on August 16, 2006, I conducted a hearing on this matter for 5 days from September 11 through September 25, 2006, in Philadelphia, Pennsylvania. Based on the evidence submitted in that hearing, including the testimony of the witnesses and my assessment of their demeanor, as well as the post-hearing briefs of the parties, I make the following findings and conclusions.

The issues presented in the case arose from an election conducted on July 26, 2006, in accordance with a stipulated election agreement in the following unit:

> All full time and regular part-time registered nurses who have worked an average of four hours per week in the 13-week period preceding June 17, 2006, including Clinical Patient Relations Representatives, Clinical Research Associates, Clinical Specialists, Disability Case Managers, Nurse Midwives, Nurse Practitioners, Perioperative Instructors (OR), Resource Nurses, Occupational Health Nurses and Women's' Center Nurses employed by the Employer.

The unit description excluded "all other employees, Registered Nurses employed by a joint venture at the Kidney Center at Vineland, Registered Nurses employed by a joint venture with the Community Health Care, Inc., Registered Nurses employed at Impact, Clinical Reimbursement Specialists, guards and supervisors as defined in the Act." The stipulated agreement provided that Case Managers, Educational Specialists and Clinical Coordinators could vote subject to challenge.[1]

The Union won the election by a vote of 299 to 279, with 67 challenged ballots, which were outcome determinative. Board agents challenged 25 voters because their names were not on the eligibility list supplied by the Employer. Pursuant to the election agreement, the Employer challenged 28 voters because they were Case Managers, alleging that they properly should be included in the unit. Also pursuant to the election agreement, the Petitioner (also referred to herein as the Union) challenged 9 voters on the ground that they were Educational Specialists and 4 voters on the ground that they were Clinical Coordinators. In addition, the Union challenged one voter on the ground that she was a supervisor. The Union's challenges were based on its view that those voters properly should be excluded from the unit. The Union also alleged that some of the other individuals whose ballots it challenged were supervisors.

During the hearing, the parties resolved 49 of the 67 challenged ballots by stipulation, including all challenges involving the case managers. Thereafter, acting on a joint motion by the parties, the Regional Director resolved the unit inclusion issues presented by those 49 challenges, counted the ballots of the 12 employees who, the parties agreed, were in the unit, and issued a revised tally of ballots that showed the Union's margin of victory was reduced to 16 votes. According to the revised tally, issued on October 4, 2006 and appended to this decision, 303 employees voted in favor of the Union and 287 against. Thus, the 18 remaining challenges, as to which I heard evidence, are outcome determinative. Five eligibility list challenges must be resolved: Barbara Chew; Linda Hitchon; Denise Jeffries; Yolanda Jost; and Doris Moore. In addition, the following 13 Union challenges must be resolved: Karen Kushner, Patricia Sanchez, and Deborah Tomlinson, because they are allegedly clinical coordinators and supervisors under the Act; Barbara Conicello, because she is allegedly a supervisor; and Vivian Bates, Cynthia Calabrese, Toni Crane, Nancy Harrell, Patricia Helsop, Donna Lilla, Margaret Merkel,[2] Eileen Niedzialek, and Monica Peterson, because, according to the Union, they are educational specialists who do not have a community of interest with other unit employees and because some of them are part time supervisors.[3]

The Employer also filed 12 objections to the election. During the hearing, however, the Employer withdrew all of its objections, except for Objections 1, 7 and 8 (Tr. 201-203). The parties presented evidence on those objections and I must determine whether the evidence on those objections requires that the election be set aside.

[1] The job category is referred to as Educational Specialists in the Notice of Hearing, but as Education Specialist in the job description itself. Both terms are used in the transcript and in this decision. But they are the same job.

[2] The parties agreed that Merkel was erroneously listed as Michel in the Regional Director's notice of hearing, and, in accordance with that agreement, the name is hereby corrected (Tr. 12, 579-581).

[3] The parties agreed that these employees were educational specialists, except for Harrell and Helsop, who, along with Kushner, had different job descriptions and reported to a different supervisor or manager (Tr. 709-710).

The Objections

As the proponent of the election objections, the Employer has the burden of proving that the conduct complained of had the tendency to interfere with the employees' freedom of choice. *Double J Services,* 347 NLRB No. 58 (2006) (slip op. 1-2). That burden is a heavy one because there is a strong presumption that ballots cast under Board rules and supervision reflect the true desires of the electorate. See *Safeway, Inc.,* 338 NLRB 525 (2002) and cases there cited. As shown below, I find that the Employer has not met its burden in this case.

Objection 1—Petitioner and/or its agent(s) inhibited and contaminated the free choice of voters by engaging in electioneering at or near the polls by parking a vehicle next to the polling entrance at the Bridgeton polling location that stated in large fluorescent letters, "YES" both in the front and back windshields. This vehicle and its message were easily seen and unavoidable by any voter on their way to the polling station.

This objection deals with events that transpired during the two voting sessions at one of the four polling locations, the Bridgeton Health Center. The polls were open at that location from 6:30 a.m. to 8:00 a.m. and from 6:30 p.m. to 7:30 p.m., on Wednesday, July 26, 2006. The evidence shows that a car owned by the Union election observer for the evening session, Rose Reed, was parked on a public side street, about three or four car lengths away from a walkway leading to the main entrance of the Heath Center. Visible from her car, which remained parked at that location for the entire day, from about 6:30 a.m. until after the end of the evening voting session, were pink signs, about 20 inches by 30 inches, on both the front and back windshields. The signs contained the word "Yes" written on them in large letters. One witness, who paced off the distance from the location of the car to the main entrance of the Health Center, estimated that it was about 250 feet (Tr. 137-138).[4]

The voting took place inside the main entrance of the Health Center, adjacent to the lobby some 25 feet from the entrance, according to the Employer's main witness (Tr. 42-45). Neither the car nor the signs were visible from the inside of the Health Center where the voting took place. Aside from Reed's testimony set forth below, the Employer did not call any employee witnesses to show whether or not they saw the signs or viewed them as carrying a pro-union message. The record shows that there is a parking lot at the rear of the Health Center, far from the main entrance, and most employees entered the building through an entrance off the parking lot (Tr. 138-139, 141-143). Reed, however, testified that some employees also used the main entrance (Tr. 131). She also testified that, on the day of the election, she heard some employees mention seeing the signs, although none knew it was her car (Tr. 127-128).

The Employer's objection essentially alleges improper electioneering because of the signs on Reed's parked car. In *Pearson Education, Inc.,* 336 NLRB 979 (2001), the Board considered another electioneering issue, the posting of an anti-union poster near the polling

[4] Four witnesses testified about this incident. The Employer's major witness was one of its lawyers, Harris Feldman, whose testimony I found unreliable. Not only was he straining to support a litigation theory, particularly by minimizing the distance between the parked car and the entrance to the Health Center, but he was confused on the timing of the voting sessions, his presence at the location during the day in question, and the exact location of the parked car. Reed and one of the Union's witnesses testified that the car was the third or fourth car from the walkway. I believe their mutually corroborative testimony on this point. The Union's other witness, an employee, testified that he never saw the car or the signs.

area on the day of the election. As the Board stated in that case, in order to determine whether alleged improper electioneering reasonably tended to interfere with employee free choice, the Board applies the factors set forth in *Boston Insulated Wire & Cable Co.,* 259 NLRB 1118 (1982), enf'd. 703 F.2d 876 (5th Cir. 1983). Those factors include the nature and extent of the electioneering, whether it was conducted by a party to the election or by employees, whether it was conducted in a designated "no electioneering" area, and whether it was contrary to the instructions of the Board agent. Applying those factors to this case, I find that the conduct in this case, unlike that in *Pearson Education*, which the Board found objectionable, did not reasonably tend to interfere with employee free choice.

In *Pearson Education*, the employer, a party to the election, hung a poster two feet by three feet depicting a list of strikes engaged in by the union within an area curtained off for the election—an area every employee had to pass in order to vote. The facts in this case are nowhere near those in *Pearson Education*. The "Yes" signs in this case were on a parked car on a public street far from the polling place, which was inside the Health Center. There is no evidence that the signs were in a no electioneering area. There is scant evidence that employees even saw the signs or were affected by them. The evidence shows that many if not most employees did not enter the Health Center through the main entrance, which was, in any event, far from the polling site. Nor were the signs visible from the polling site. Although the signs appeared on the car of a union observer, Reed was an employee, not a party to the election. In any event, there is no evidence that employees knew whose car it was that contained the signs. The signs were much less prominent than that in *Pearson Education*. Nor was their message as loaded as that in *Pearson Education*; it simply stated the word "yes," without elaboration. Although one of the Employer's lawyers brought the matter to the attention of the Board agent conducting the election, the Board agent declined to intervene and there is no evidence that the signs were contrary to the Board agent's instructions. Indeed, in *Boston Insulated Wire, supra*, the Board found unobjectionable conduct that was arguably more intrusive than that in the instant case. In that case, union agents passed out a campaign leaflet and spoke to employees as they were on their way to the building in which the election was being held. This case involves conduct that is much less intrusive that that in *Boston Insulated Wire.* In these circumstances, I find that the Employer has not shown that the Yes signs on a parked car well away from the polling site had a reasonable tendency to interfere with employee free choice. I therefore overrule Objection 1.[5]

<u>Objection 7—Petitioner and/or its agent(s) and/or a Board agent engaged in activity that irrevocably contaminated the veracity of the election by allowing an observer for Petitioner to cast two ballots.</u>

The evidence submitted on this issue does not establish that the Union's observer cast two ballots and I find that she did not. The objection deals with events that occurred during the evening voting session, from 6:30 p.m. to 7:30 p.m., at the Regional Medical Center location. During that session, the two election observers, Jan Fox for the Employer and Sally Carr for the Union, were given permission to vote by the Board agent conducting the election, during a lull in

[5] Contrary to the Employer's assertion (Br. 4-5), the situation in this case is not comparable to the situation in *Purolite*, 330 NLRB 37 (1999), in which the Board set aside an election because the union in that case broadcast tape recorded pro-union songs for 9 ½ hours outside a polling site at the employer's premises. As the Board stated in *Purolite,* the sound was clearly audible to anyone entering the premises and carried into work stations throughout the facility, such that a number of employees testified that they heard the pro-union message and understood its persuasive character. The situation in this case is clearly distinguishable.

the voting. The voting procedure required that the observers check off the names of the voters on the eligibility list, as they presented themselves to vote. The voters approached a table where the two observers were seated, together with the eligibility list which they used to verify that the voters who presented themselves were indeed employees on the eligibility list. After each voter identified his or herself, the observers each placed a check mark next to the voter's name on the eligibility list, one in blue for one observer and one in red for the other. When it came time for the observers to vote during a lull in the voting, Carr, who was seated next to Fox at the voting table, noticed that two checks appeared next to her name on the eligibility list. She told Fox and the Board agent of her discovery and the other two confirmed the existence of the check marks, which would normally signify that Carr had voted. Neither Carr nor Fox had made the check marks, however, so they must have been made by the two observers in the morning session of the voting at the Regional Medical Center. The same eligibility list was used at both sessions. Carr told Fox and the Board agent that, notwithstanding the check marks, she had not voted previously, although she testified she had appeared at the morning session prepared to vote but had arrived late and decided to vote later in the day at the evening session. The Board agent had Carr swear under oath that she had not previously voted and then gave Carr a ballot. She also gave Fox a ballot and both observers cast their votes, placing their ballots in the ballot box. About two or three minutes later, Fox, who had been present during the above sequence of events, asked to challenge Carr's vote. It appears that her reason for the challenge was the appearance of the two check marks next to Carr's name. Fox testified that she had only seen Carr vote once during the evening session and had not made either of the check marks that appeared next to Carr's name. The Board agent, who testified in this proceeding and whom I found to be credible and reliable—and totally objective, told Fox that she could not challenge Carr or any voter after the ballot was marked and placed in the ballot box. The Board agent also told Fox that once the ballots had been placed in the ballot box they could not be distinguished from one another. The Board agent also credibly testified that, prior to the beginning of the voting session, she had given detailed instructions to both observers about the procedure in challenging voters. The challenge had to be made before the voter was given a ballot because the procedure required that the ballot be placed in an envelope with the voter's name on the outside of the envelope so that the validity of the challenge could be determined if necessary after an evidentiary hearing. I have no doubt that the Board agent properly instructed the observers on the challenge procedures.

I overrule the objection because I am satisfied that Carr only voted once. She testified truthfully before me that she had only voted once and she swore under oath before the Board agent that she had only voted once. That testimony was not disputed. Fox did not see Carr vote twice during the evening session and it defies belief that Fox, the Employer's observer, would have permitted Carr to vote twice in the evening session. There is no other independent evidence that Carr voted twice. The only evidence even suggesting that she voted twice was the appearance of two check marks next to her name on the eligibility list that had been placed there prior to the evening session. I believe in all the circumstance that this was a mistake made by the observers in the morning session. The mistake by the observers in the morning session did not taint the election. There is no evidence that whatever happened in the morning session prevented anyone from voting or adversely affected voters. Obviously, both election observers in the morning session verified the eligibility of some unnamed voter in the morning session, but mistakenly checked off Carr's name instead of the unnamed voter, who may well have been listed close to Carr's name on the eligibility list. But the important fact here is that Carr did not vote twice. Nor did the Board agent's conduct after the mistake came to light taint the election. The Board agent's conduct was perfectly proper and reasonable. The Board agent received assurances under oath that Carr had not previously voted and Fox's challenge after Carr placed her ballot in the ballot box was clearly untimely. Nor did the discussions about

Carr's vote taint the election process. There is no evidence that any voters overheard the discussion. In these circumstances, I shall overrule Objection 7.

Objection 8—A Board agent engaged in activity that irrevocably disenfranchised eligible voters and irrevocably contaminated the veracity of the election by closing a poll early and by failing to properly handle an alleged late vote. Specifically, the Board agent at the Elmer polling location closed the poll before the 7:30pm end date. An employee who came in to vote was told it was too late to vote. Thereafter, the Board agent permitted the employee to vote under challenge, but failed to place the challenged vote in the ballot box, but rather, placed it in the pocket of his jacket. Based on the Board agent's representation that the ballot was cast 5 minutes too late, and was handled in the manner above, the ballot was set aside. The Petitioner agreed with the challenge and the ballot was set aside. Subsequently, witnesses have come forward stating that the voter was not tardy, but that the Board agent closed the poll early.

The evidence in support of this objection does not establish that the employee involved appeared to vote prior to the closing time or that the Board agent did anything improper in handling the situation. The voter, employee Joanna Rider, testified that she was running late when she was on her way to vote at the Elmer Hospital polling site during the evening session, which ended at 7:30 p.m. She called a colleague at Elmer on her cell phone to tell the colleague to open the doors for her. According to her testimony, she arrived at the hospital at 7:25 p.m., parked her car, ran to the entrance, through a hallway and into an elevator to the second floor where the polling site was located. Rider testified that when she arrived at the polling site, she was told the polls were closed, but she insisted that her cell phone properly reflected the time as 7:30 p.m (Tr. 53-57).

When Rider arrived at the polling site, the voting had already been concluded because it was past the 7:30 p.m. closing time. Both observers had left the room where the balloting had taken place. The Union observer, Ethel Frazier, was not present in the area at all. The Employer observer, Cynthia Calabrese, was on crutches in the hallway outside, waiting to meet another employee who was going to give her a ride home. She was in the hallway when Rider arrived. The Board agent was still in the room where the voting had taken place.

The Board agent, Devin Grosh, testified that he closed the voting at 7:30 p.m., after checking his cell phone as to the accuracy of the time and making an announcement of the time. He even went outside the room where the balloting took place and into the hallway outside to announce that the polls were closing. No one was there. He then disassembled the voting booths and gathered all his documents and papers. Grosh then sealed the ballot box with tape and both the Union and Employer observers signed or initialed the tape. Tr. 96-98. He was corroborated by the Union observer, Ethel Frazier, on these points; Frazier credibly testified that she checked her watch when Grosh made his announcement and it was indeed 7:30 p.m. Tr. 116. When Rider presented herself to Grosh, he told Rider she was late. According to Grosh, he checked his watch when Rider arrived and it was 7:34 p.m. Tr. 98. After calling both the Union and the Employer observers back into the voting area—Frazier actually had to be paged—he told Rider that he would let her vote a provisional challenged ballot. He put her ballot in an envelope with Rider's name on it and put the envelope in his pocket. He told Rider and the two observers—no one else was present—that he would bring the matter to the attention of Union and Employer representatives at the Regional Medical Center, who would oversee the vote count later that evening, and, if they agreed, Rider's vote could be considered a challenged ballot. There was no such agreement so the ballot was neither counted nor considered a challenged ballot (Tr. 98-100).

I credit the testimony of Devin Grosh that Rider arrived late, after 7:30 p.m., after the polls had closed and the ballot box was sealed. His testimony that he closed the voting session at exactly 7:30 p.m. is corroborated by Frazier. I found both Grosh and Frazier to be candid, detailed and reliable in their testimony. Indeed, Grosh was a completely neutral witness and had no reason to lie, unlike Rider, whose interest was in getting her vote counted. Calabrese was less reliable than Grosh and Frazier, but did not dispute that the announcement was made as indicated by Grosh and that he had dismantled the voting booth and sealed the ballot box, and that she and Frazier had left the voting area before Rider arrived. Although she was quite hesitant and reluctant to concede that the announcement accurately reflected the time as 7:30 p.m—indeed, she suggested at one point that the ballot box was sealed between 7:15 and 7:30 p.m. (Tr. 80), nothing else in Calabrese's testimony really contradicts the testimony of Grosh or Frazier. To the extent that Calabrese can be viewed as suggesting that the balloting was halted prior to 7:30 p.m., I reject it as contrary to the credible testimony of Grosh and Frazier. I also find it implausible that Calabrese, as the Employer's election observer, would permit the polls to be closed before the appointed closing time. Moreover, in contrast to the clear and corroborative testimony of Grosh and Frazier, I found Rider's testimony that she arrived at the polling site at 7:30 on the dot unreliable. Her testimony was less clear and precise than that of Grosh and Frazier. She admittedly was rushing to get to the polling site before the official closing time and the time on her watch admittedly did not match the time reflected on her cell phone. I believe, based on all the circumstances, including my observation of her demeanor, that she tailored her testimony about her arrival time in order to place herself at the polling site within the time limitations.

Since Grosh properly closed the voting at the appointed time and Rider arrived late, Rider was not entitled to vote. Indeed, Grosh handled the matter appropriately. He preserved her ballot and submitted it to the Employer and Union representatives. They could have agreed to accept her late ballot, but they did not. The Employer's suggestion that Grosh should somehow have unsealed the ballot box and permitted the challenged ballot to be placed in the ballot box is without merit. That would not substantively have made any difference because, as I have found, she was late and her vote was not valid. But, more importantly, the Board agent would properly have been criticized had he done what the Employer suggests because he would have undermined the integrity of the election by unsealing the ballot box. The question is whether Rider was late in arriving at the polling site. I have found she was. There is accordingly no substance to the Employer's objection. I therefore overrule Objection 8.

To summarize, I overrule Objections 1, 7 and 8 and find that the election of July 26, 2006 was valid and free from objectionable conduct.

The Challenges

As indicated above, several of the voters were challenged by the Board agent because the voters did not appear on the eligibility list supplied by the Employer to the Board. Others were challenged by the Union, some based on its contention that the employees did not have a community of interest with the other nurses in the unit and others based on the contention that they were supervisors, including some who were allegedly part-time supervisors. In its brief, the Union did not renew its community of interest contentions as to some of the employees whose votes it challenged, although the Employer, in its brief, answered those community-of-interest contentions made by the Union at the hearing. I believe that I must discuss the issue in this decision not only because the Union raised it during the hearing, but because community-of-interest principles are traditionally used by the Board in determining voter eligibility. See *Extendicare Health Services, Inc.*, 347 NLRB No. 50 (2006) (Slip op. at 3-4).

Yolanda Jost

Yolanda Jost has worked for the Employer as a registered nurse for over 30 years. For the past 10 years she has been a per diem nurse in the emergency department. She worked at least two 12-hour shifts per week at the Bridgeton facility. This would clearly have made her eligible to vote under the stipulated eligibility requirement that employees work at least 4 hours per week in the 13 weeks prior to the July 26, 2006 election. Jost, however, did not work during most of the 13 week period leading up to the election. She took an Employer-approved medical leave of absence from about March 20 to June 26, 2006 (Tr. 483). She intended to, and actually did, return to work after her medical leave ended (Tr. 483-485).

In accordance with the Employer's policies and practices concerning medical leave, Jost applied for and received disability payments from the State of New Jersey for the time she was on leave. She also obtained medical reports on her progress and her anticipated return to work, which she provided to the Employer (Tr. 480). The Employer normally provides medical leave for up to six months for its regular employees (Tr. 486, 493, 495). A per diem nurse, such as Jost, would, unlike full-time or regular nurses, be given an "unprotected" leave of absence, which means she would not be guaranteed a position upon her return (Tr. 494). Although the letter approving Jost's medical leave referred to an "unprotected" medical leave, the letter also assumed that she would return to work because it set forth the procedure by which she could be "medically cleared to return to work." P. Exh. 13.

The Board's rule on employees who would have been working and eligible to vote but for an approved medical or disability leave of absence is that those employees are presumptively eligible to vote, absent an affirmative showing that the employee has resigned or been discharges. *Red Arrow Freight Lines,* 278 NLRB 965 (1986). The Board recently reaffirmed this long standing rule in *Home Care Network, Inc.,* 347 NLRB No. 80 (2006). Under these authorities, Jost is eligible to vote. She was on an Employer approved medical leave of absence during the pre-election period and there is no evidence that she resigned or was discharged. Indeed, she intended to return to work and actually returned to work and was working by the time of the election. I therefore find that she is eligible to vote and overrule the challenge to her ballot.

Linda Hitchon

As indicated above, the Board agent conducting the election challenged Linda Hitchon because her name did not appear on the eligibility list provided to the Board by the Employer prior to the election. That list is, under Board rules, required to be provided to the Union prior to the election so that the Union, as well as the Employer, knows who is eligible to vote and may address those voters in its campaign. In Hitchon's case, the relevant inquiry is whether she worked the minimum amount of time to be eligible to vote, that is, an average of 4 hours per week in the last 13 weeks preceding the election. Unfortunately, the evidence on Hitchon's work is sketchy. She did not testify, despite my expression to the parties that her testimony was important, because, I was told, she had personal care needs that kept her from leaving her home and coming to testify in this proceeding.

According to Judith Fisher, the CEO of South Jersey Healthcare Community, who was the only person to testify on this specific issue, Hitchon is a registered nurse who makes home care visits (Tr. 146). She is paid on a per visit basis, at the rate of $40 per visit, which includes not only direct and physical patient care in the home, but also any preparation and driving time to and from her house and the home of the patient (Tr. 147-149). Hitchon is the only home care nurse—indeed, the only nurse—who was paid on a per visit basis rather than an hourly or

salary basis (Tr. 165, E. Exh. 2). Hitchon chose this method of employment herself, and, although she receives no benefits, it apparently gives her a lot of flexibility (Tr. 151,166-167).

Based on documentary evidence, the parties stipulated that Hitchon made 39 home visits during the relevant 13 week eligibility period (Tr. 153-157, E. Exh. 2). She was also paid for 3 regular hours spent at one of the hospitals during that period for a meeting that required her attendance (Tr. 157). According to Fisher, Hitchon was paid on an hourly basis for such meetings, although Fisher did not know Hitchon's rate of pay for that time (Tr. 152). Since Hitchon is the only home care nurse paid on a per visit basis, the Employer tried to translate that information to an hourly basis. Fisher testified that she would attribute 2 ½ hours to each visit. But her testimony was not clear or particularly reliable in this respect. Nor was it specific to Hitchon's particular work or her visits within the applicable 13 week period. When asked by the Employer's attorney whether she had an understanding as to how the visits translated into "actually hours worked," Fisher at first testified that "we've looked at that . . . ." Tr. 148. That answer was interrupted by an objection by the Union's lawyer, which I overruled. Fisher then described how she came to her opinion that each visit on average would amount to 2 ½ hours, breaking down each element of the job, taking into account whether it was a first visit or a follow-up visit and attributing 15 minutes each way for commuting time (Tr. 149-150). On cross-examination, she agreed that sometimes, especially after the initial visit, the home care nurse would spend "much less" than 2 ½ hours per visit, perhaps as little as 30 minutes with the patient (Tr. 159, 163-164). She also conceded that her 2 ½ hour figure was "arbitrary." Tr. 163. When Fisher did describe where she got her hourly figure, she testified that it was an "industry standard," but she was unable to provide any details in support of her testimony (Tr. 164). She was unable even to testify whether the so-called industry standard was published. Even though she intimated that she could obtain that information, no such underlying information, which allegedly would have supported her testimony, was provided (Tr. 164-165). Indeed, she even suggested that the information, if it existed at all, was outdated; she testified, "I know we've done this. We did this years ago." Tr. 164.

According to Fisher, other home care nurses who are paid on an hourly basis earn from $24 to something in the mid 30 dollars per hour (Tr. 166). The Employer's formula (2 ½ hours per visit) would mean that Hitchon would earn $16 per hour, without benefits (Tr. 151, 167). In contrast, Denise Jeffries, who does the same kind of work and whose situation is discussed below, earns $28 per hour, plus benefits, and mileage for the use of her car.

On this sketchy record, I cannot conclude that Hitchon belongs in the unit or is eligible to vote. First of all, Respondent has not shown that Hitchon worked an average of 4 hours per week in the 13 weeks leading to the election. No one testified reliably as to how many hours she actually worked. Fisher's testimony amounts to an estimate, which she conceded was arbitrary. Her reference to an industry standard is quite ambiguous and ultimately not helpful. I am not sure whether this underlying information exits or whether it is current or even applicable in Hitchon's case. In any event, the information was not provided. I am left with evidence that Hitchon made a certain number of home care visits, but with no evidence as to how long those visits lasted. Indeed, I do not even know how many patients were involved, whether they were first visits, which might take more time, or follow-up visits, which would take less time, or how far they were from Hitchon's home. Accordingly, I cannot conclude, on this record, that Hitchon worked the requisite hours to be eligible to vote. Secondly, the Employer's formula would mean that Hitchon worked for $16 per hour, without any benefits. This is much less than other nurses, including home care nurses, earned. It seems unlikely or implausible that her time per visit would be as high as the Employer estimates. The Employer's formula is thus flawed both

because it is unsupported by reliable evidence and because it leads to an unlikely or implausible result.[6]

But, even apart from Hitchon's hourly pay, which is really incalculable on this record, she deliberately decided to be paid on a per visit basis and she did so for her convenience. Since she is the only home care nurse to be paid on a per visit basis, and is not paid benefits or even mileage for use of her car, I find that she does not share a community of interest with other nurses in the unit. I am confirmed in this view because I think her pay is much less on an hourly basis than other nurses in the unit. Thus, I find her vote should not be counted for two reasons: (1) The Employer has not shown that she worked the requisite hours established in the stipulation of parties for eligible voters; and (2) she does not share a sufficient community of interest with the other nurses in the unit to be included with them. I therefore sustain the challenge to her ballot.

Barbara Chew

Barbara Chew has two jobs for the Employer. For 20 hours per week, during the week, she serves as a supervisor, in the long-term care department, of home health aides (Tr. 443). She supervises about 17 home health aides, who are not nurses, and does so out of an office in Salem, New Jersey, although most of her supervisory duties take her into the field (Tr. 444). The parties stipulated that, in this job, Chew is a statutory supervisor (Tr. 441). In her other job, another 20 hours on weekends, she serves as a home health nurse, performing skilled nursing duties in the homes of patients (Tr. 443-444).

Although the Employer contends that supervising non-unit employees is not sufficient to warrant excluding supervisors such as Chew from the unit, Board law is otherwise. For many years, the Board required a somewhat hard-and-fast rule on the unit inclusion of employees who were both professionals and also supervised non-unit employees. The rule was that if they performed supervisory duties at least 50% of their time they were considered supervisors and excluded from the unit. That rule was relaxed somewhat in *Detroit College of Business,* 296 NLRB 318, 321 (1989). In that case, the Board rejected the hard-and-fast 50% rule and excluded professional employees who were part-time supervisors, even though they supervised non-unit employees only 25% of their time, based on a number of factors bearing on whether or not the individual supervised employees as part of his or her primary duties and was more aligned with management than with fellow professional employees. Here, an analysis of these factors reasonably leads to the conclusion that Chew should be excluded from the unit. She performs unit work in the home of patients and on weekends. But her supervisory functions during the week, which call for her supervision of 17 home health aides, are separate from and not ancillary to her home care nursing functions. She spends about 50% of her time on such supervisory activities, which entitle her to an office, which she uses to do the kind of paperwork required of a supervisor. In its recent holding in *Oakwood Healthcare Inc.*, 348 NLRB No. 37

[6] At footnote 13 of its brief (Br. 30), the Employer suggests that estimating Hitchon's hours per visit at 1.5 hours, which works out to $26.67 per hour, would still make her eligible with 58.5 hours during the 13 week eligibility period. But this estimate would still be too generous if Hitchon's care was for a patient she had been treating for some time and one who lived near her home. That might amount to one hour per visit—estimating one-half hour for patient care and 15 minutes driving time each way, figures based on Fisher's testimony—or 3 hours per week, a figure that is still under the eligibility formula. But even this does not substitute for evidence of actual hours worked. The bottom line is that the Employer's estimate at the hearing or here is not evidence and it is too speculative upon which to make findings of fact.

(2006), discussed more fully later in this decision, the Board noted that individuals who regularly supervise even fellow unit employees for 10 to 15% of their time may be considered supervisors within the meaning of the Act. Although that ruling is not technically on all fours with the situation here because Chew supervised non-unit employees, it is consistent with the *Detroit College of Business* holding. See also *Rite Aid Corp*., 325 NLRB 717 (1998). In any event, Chew's substantial and regular supervisory duties make her a supervisor more aligned with management than with unit employees. She is thus not entitled to vote and the challenge to her ballot is sustained.

Doris Moore

Doris Moore works at the Employer's Elmer location. She has worked for the Employer for over 30 years in many capacities, including as a part-time nurse supervisor and as a part-time nurse community educator (Tr. 401-402). Her last non-supervisory position and the one in which she was employed at the time of the election was as the Employer's only breast cancer bridge coordinator (BCBC). She assumed that part-time position, which requires the incumbent to be a registered nurse (Tr. 430), after surviving a bout of breast cancer about 5 or 6 years ago. Moore works 24 hours per week in the BCBC position, depending on "patient needs." Tr. 407-408, 412-413. Moore testified that, in her BCBC job, she does not provide direct physical care to breast cancer patients, but helps them with their financial, emotional and spiritual needs, often following them after their discharge from the hospital and meeting with them and their families at home or outside the hospital setting. Her contact with other nurses is somewhat limited, mostly at the initial stages of her work when patients are referred to her (Tr. 415-419, 435-436). She also acts as a grief counselor, providing "end-of-life support for patients and families." Tr. 420. In addition, she provides community education on breast health, speaking to high school students, church groups, health fair attendees and others (Tr. 435). Moore does not work regular hours; as she testified, she does not have "a predictable schedule." Tr. 408. She does not come into the hospital every day, although about 75% of her time is spent in the hospital, where she keeps a private office, one floor away from patient areas (Tr. 434).

Moore is also one of about 6 or 7 employees at Elmer, who serve, part time, as a house supervisor (Tr. 424-425), which, as the Employer concedes (Tr. 411), is a supervisory position within the meaning of the Act. Moore has served in this capacity—as a part-time house supervisor—for many years. She did serve "regularly"—working two 8-hour shifts per week—as a part-time supervisor from 1977 until the late 1980s, when she became a part-time nursing community educator, working about 12 hours per week in that capacity (Tr. 401-402). She continued to work as a house supervisor thereafter and up to the present, but not as frequently as before (Tr. 407). She is scheduled as a house supervisor when available and when needed, at times other than the times she works in her BCBC job. Sometimes she is scheduled well in advance and sometimes on short notice. As house supervisor, Moore mostly works on evening shifts, during which she is the highest ranking nurse supervisor in the hospital. Often she works an eight-hour shift. In the past 8 1/2 months, Moore has worked as a house supervisor a total of 21 times, at least once a month throughout that period, for a total of 106 hours (Tr. 402-403, 410-415, P. Exh. 7). This works out to about 3 hours per week on average, about 11% of her total work time.

The Union alleges that Moore is a supervisor because of her part-time supervisory work. In *Oakland Healthcare, supra*, slip op. 9, the Board restated and clarified its rule on whether employees who serve as part-time supervisors are excluded from voting units because they are statutory supervisors. In the Board's view, such individuals are supervisors if they spend a regular and substantial portion of their time performing supervisory duties. In this context, the Board stated that "regular" means "according to a pattern or schedule, as opposed to sporadic

substitution," citing, at footnote 47, a case (*Rhode Island Hospital*, 313 NLRB 343, 349 (1993)), in which an individual who served as a supervisor every fourth week was found to be a statutory supervisor. Citing applicable authority at footnotes 48 and 49, the Board affirmed, in *Oakwood*, that, while a strict numerical formula for substantiality is not required, supervisory status has been found where the individuals have served in a supervisory capacity for "at least 10-15 percent of their total work time."

Applying the Board's standards for part-time supervisors to Moore's situation, I find that Moore is indeed a statutory supervisor. Her functions as a house supervisor are admittedly supervisory functions. She performs them according to a pattern or schedule. She is one of a small group of senior nurses at the Elmer facility who are regularly called upon to serve as house supervisors and she has served frequently in that capacity, on average two or three times a month in the past 8 ½ months, mostly on the evening shift when she is the highest ranking nurse on duty. Indeed, Moore has served as a part-time house supervisor for the Employer over a span of nearly 30 years. This pattern of service clearly qualifies as "regular" service as a supervisor within the meaning of Board law. Likewise the time she spends as a house supervisor, 11% of her time most recently, is sufficiently substantial to qualify her as a statutory supervisor, especially when it is contrasted with the time she spends in her BCBC job where, according to her own testimony, she does not have a "predictable schedule." Significantly, Moore does not simply substitute for a supervisor while she is working in her BCBC job; she is separately scheduled for the house supervisor's job, sometimes far in advance, sometimes on short notice. In these circumstances, I find that Moore is a supervisor within the meaning of the Act.

Alternatively, I find that Moore's two jobs do not give her a sufficient community of interest with the nurses in the unit to warrant her inclusion in the unit. First of all, a significant part of her time—and a good deal of her interaction with the nurses—is as a house supervisor. Even without regard to whether Moore's part-time supervisory duties alone render her a statutory supervisor, they certainly bear on the issue whether those duties, along with her other duties, align her sufficiently with the other nurses in the unit to warrant her inclusion. In any event, even apart from her job as a part-time house supervisor, I would exclude her from the unit. The remainder of her time is spent in her BCBC job, which is a unique, one-of-a-kind position, apparently created especially for her, based not only on her experience as a long time house supervisor and nursing community educator, but as a breast cancer survivor. In that job, she does not have regular hours and does not always come in to the hospital. She counsels patients and their families about a variety of issues, including end-of-life issues; and much of such counseling is done outside the hospital and in the homes of the patients. And she speaks to community groups and schools outside the hospital setting about breast cancer issues. Her contact with other nurses in the BCBC job is limited and she provides no physical care to patients. In these circumstances, I find that Moore does not have a sufficient community of interest with nurses to make her eligible to vote. I therefore sustain the challenge to her ballot.[7]

[7] In its brief (Br. 8), the Employer contends that Moore is much like the "quality review nurses" that were included with other nurses on community of interest grounds in *Pocono Medical Center,* 305 NLRB 398, 399 (1991). That case is distinguishable. Moore's BCBC duties are nothing like those of the quality review nurses in *Pocono*, who spent about ¾ of their time in the nursing units and none of their time doing home and family visits or community service outside the hospital. Nor did they spend part of their time doing work that is supervisory within the meaning of the Act.

Denise Jeffries and Barbara Conicello

These two challenges are treated together because Denise Jeffries and Barbara Conicello were registered nurses who would clearly have been eligible voters but for their part time service as house supervisors. The Union contends that the time they spent on their supervisory duties warrants their exclusion from the unit. The Employer contends, to the contrary, that their time spent on supervisor duties was not substantial or regular enough to warrant their exclusion. I find both parties are partially right: Jeffries is in and Conicello is out.

Denise Jeffries has worked for the Employer for about 5 years. At the time of the election she was a home health care nurse who worked 32 hours per week in that position. She is considered a part-time regular employee, with benefits. And she is paid at an hourly rate of $28 per hour, plus mileage based on the use of her car (Tr. 281, 307). She also works at the hospital, on occasion, as a per diem house supervisor, a position that the Employer concedes is a supervisory position within the meaning of the Act. For the 8 ½ months prior to the hearing, Jeffries worked as a house supervisor on 9 occasions for a total of 37 hours. Most of her work as a house supervisor was early in 2006. She did not work in that position from June through September of 2006. P. Exh. 6. Moreover, Jeffries testified that, for personal reasons, she only intends to work about 30 hours per year in that position (Tr. 284-285). Those hours are clearly an insubstantial portion of her total work hours, most of which are spent as a registered nurse doing unit work. Nor does her work follow a pattern sufficient to render it "regular" service, particularly since her service was clustered in segments at the beginning of the year. Accordingly, under the Board's *Oakwood Healthcare* standards, discussed above in connection with Moore's challenged ballot, I find that Jeffries' work as a part-time supervisor is not sufficiently regular or substantial to warrant her exclusion from the unit as a statutory supervisor. Thus, she is entitled to vote and I will overrule the challenge to her ballot.[8]

Barbara Conicello has worked for the Employer for about 17 years. At the time of the election, she was a staff registered nurse in the critical care float pool (Tr. 464). But for a number of years she served in supervisory and management positions for the Employer. She stepped down from a management position to a rank and file position in February of 2005, at which time she took a cut in her pay. She did so for personal reasons. In her present position, she is considered a full-time employee and works 36 hours per week, apparently during weekdays (Tr. 465). Conicello also works on weekends as a house supervisor, an admitted supervisory position (Tr. 461). She estimates that she works, on average, from 24 to 36 hours per month in that supervisory position (Tr. 467). She has done so on a regular basis about 2 or 3 times a month, usually working 12 hour shifts (Tr. 469). She is paid more when she works as a house supervisor than when she works as a staff nurse (Tr. 470). Using the figure of 30 hours per month—the midpoint between 24 and 36—for Conicello's supervisory time, I calculate that Conicello spends about 17% of her time performing supervisory duties. Because she does so regularly and because it is a substantial part of her work, I conclude that she should be excluded from the unit, under the Board's *Oakwood Healthcare* rationale for the exclusion of part time supervisors. See particularly the cases cited at footnotes 47 and 49 of the *Oakwood Healthcare* decision, supra, at slip op. 9. I therefore find that Conicello is ineligible to vote and the challenge to her ballot is sustained.[9]

[8] I reject the Union's contention, made at the hearing, but not renewed in its brief (Br. 54-56) that Jeffries does not have a community of interest with the rest of the nurses in the unit. She is a registered nurse and does direct and physical patient care for most of her working time.

[9] In its brief (Br. 11), the Employer questions whether Conicello's supervisory assignments were "regular" within the meaning of *Oakwood Healthcare*. I find that they were. She admitted

Continued

The Educational Specialists

As indicated above, the Educational Specialists were permitted to vote challenged ballots. The Union challenged their ballots, alleging, at the hearing, that they do not belong in the unit because they do not have a community of interest with the nurses in the unit. The Employer wants them included. Not all of the 9 stipulated educational specialists testified, but their job descriptions are in evidence. Two of them, Margaret Merkel and Cynthia Calabrese, testified in this proceeding. Karen Kushner also testified. She was challenged by the Union as a clinical coordinator, but the evidence in this case shows that she does not hold that position and that she is in fact a clinical nurse specialist (P. Exh. 19). Indeed, the testimony indicates that, while her duties are varied, she has many of the same functions as the educational specialists. I will thus consider her status in this portion of the decision. Two other employees challenged as educational specialists, Nancy Harrell and Patricia Helsop, are in fact clinical nurse specialists. Although at one time they were listed as members of the Education Department, Kushner, Harrell and Helsop, are no longer in that department, and, unlike the other educational specialists, they report directly to one of the vice-presidents in charge of patient services at their hospitals (P. Exhs. 19 and 20, R. Exh. 4, Tr. 655-666).[10]

Margaret Merkel is an educational specialist at the Regional Medical Center (RMC). As is required in her job description, she is a registered nurse; in fact, she has a doctorate degree in health services (Tr. 583). Although her primary job is training nurses in her specialty, critical care, she does so not only in a classroom setting, but also in connection with direct patient care (Tr. 583-584). About 50% of her time is spent in direct physical patient care, essentially conducting on-the-job training, making her rounds and going from one nursing station to another. She goes into the patients' rooms with the nurses. She helps the nurses in "fixing a wound" and "chang[ing] the patients." Tr. 587. She is in the education department and reports to Florence Mori, the education manager, and Emily Turner, the education director. Mori and Turner, in turn, report to Betty Sheridan, who is the Employer's director of nursing (Tr. 598). Merkel works out of a private office, as do the other educational specialists, and works a regular Monday through Friday schedule, full time, beginning at 5:00 a.m. About 20% of her time is spent in the office, but the rest of her time is spent on the nursing floor, interacting with nurses (Tr. 599). Merkel also trains other staff members, including doctors. Tr. 586, 590. She earns $30 per hour. Tr. 594.

Cynthia Calabrese is an educational specialist at the Elmer facility. She works full time, that is, a 40 hour week, usually from 8:00 a.m. to 4:30 p.m., Tr. 606-607. Although she too has

---

they were "regular" in response to a question from Union counsel (Tr. 469). She also testified that she performed her supervisory duties "about two or three times a month," and did so during the night shift on weekends, when she was not working as a staff nurse (Tr. 468-469). In addition, she testified that she "usually" knew in advance when she was scheduled to work as a house supervisor (Tr. 469). All of these circumstances support the finding, consistent with her testimony, that Conicello's supervisory work was according to a "pattern or schedule" and thus "regular." See *Rhode Island Hospital,* 313 NLRB 343, 349 (1993), cited with approval at footnote 47 of the *Oakwood decision*, in which a person who served as a supervisory every fourth weekend was found to be a supervisor.

[10] In its brief, the Union appears to have abandoned its community of interest contention as to this category of employees and contests only the status of Calabrese and Kushner and only on the basis of their alleged supervisory status (Br. 56-57). As shown below, in my specific analysis of these two challenges, I reject the Union's contentions that Calabrese and Kushner are supervisors because of the work they performed as part-time house supervisors.

an office, most of her time is spent teaching nurses and other personnel. Like Merkel, she does a lot of on-the-job training; her work with staff nurses also involves direct physical patient care (Tr. 612-613, 620-621). For example, she would help a nurse with starting IVs if it is "a difficult stick." Tr. 613. As an educational specialist, Calabrese earns $30 per hour (Tr. 620). In addition to her work as an educational specialist, Calabrese also works, on occasion, as a staff nurse, a non-supervisory position, and as a house supervisor, a stipulated supervisory position (Tr. 616-617, 609, P. Exh. 17). She was unable to estimate the number of hours she worked as a staff nurse, but, according to Employer records, she worked as a house supervisor on 23 occasions for a total of 136 hours from January 2006 through mid-September 2006. Although she worked as a house supervisor at least once a month in the first six months of the year, she did not work as a house supervisor at all in July, August or September of 2006. P Exh. 17. Although Calabrese was one of several individuals who were used for such assignments at Elmer (Tr. 610-612), she denied that "regularly" took these assignments (Tr. 611). In any event, the time Calabrese spent on such assignments amounted to less than 10% of her total hours—even less if the indeterminate hours she works as a staff nurse are added to the total.

Contrary to the Union's position, I find that Calabrese's work as a part-time house supervisor is insufficiently regular or substantial to make her a statutory supervisor within the meaning of *Oakwood Healthcare*. As indicated above, although at the beginning of 2006 she worked fairly regularly as a house supervisor, in the last 3 months prior to the hearing, she did not work at all as a house supervisor. Thus, I do not believe that, overall, her work as a house supervisor exhibited a pattern sufficient to make it "regular" within the meaning of applicable authorities. Moreover, the time that she spent as a house supervisor in 2006 is under the low end of the Board's numerical threshold for a finding of substantiality. Calabrese's other job as an education specialist was a full time 40 hour per week job, with substantial interaction with other nurses and direct physical contact with patients when necessary for training purposes. She also worked on occasion as a staff nurse. In all the circumstances, I find that her work as a house supervisor does not make her a statutory supervisor and that her overall job, even considering her occasional stints as house supervisor, is sufficiently close to that of other nurses in the unit so that she shares a community of interest with them.

Karen Kushner, who works out of the Elmer facility, where she has an office, earns about $70,000 per year or about $36.36 per hour, based on a 40-hour work week (Tr. 626-628). She testified that she is part of the education department, but is under the direct supervision of Janet Davies, who is the director of nursing at the Elmer facility. Tr. 628, 644-646. As indicated above, Kushner is neither a clinical coordinator, nor an educational specialist. Her job title is that of a clinical nurse specialist—medical surgical (P. Exh. 19, Tr. 622), but her job, as she described it in her testimony, is multi-faceted. In addition to her work as a clinical nurse specialist, she is a certified nurse practitioner, a job category which is included in the election unit (Tr. 622, 642). She also performs significant education functions. Tr. 622. For example, she serves as a part-time faculty member at Cumberland Community College under an agreement with the Employer; that work is, according to Kushner, incorporated in her job description. She works at the College for 12 hours per week as an instructor and about one day a month in "occupational health." Tr. 622-623. She is paid by the Employer for this work. Tr. 623. Although she does not work as a staff nurse, her educational functions call for her to teach and interact with nurses, utilizing her specialties, and much of her work is in direct physical patient care. (Tr. 623-624, 639-640). Her 12 hours per week at the College, according to Kushner, involves teaching nurses at the bedside of patients (Tr. 636). Although the amount of direct patient care during the rest of her time varies, Kushner estimates that, in some weeks, it can amount to 20 hours. Tr. 636-638. About 80% of her time is spent interacting with nurses. Tr. 638.

Kushner also worked, on occasion, as a house supervisor at Elmer (Tr. 634-635). She worked 36 hours as a house supervisor in the 8 ½ months prior to the hearing. This included 32 hours in January and the first two weeks in March of 2006 and 4 hours in August of 2006 (P. Exh. 18). Contrary to the Union's contention that this work as a part-time house supervisor made her a statutory supervisor, I find that Kushner's work as a house supervisor was far too sporadic and insubstantial to make her a statutory supervisor under applicable authorities. See discussion above with respect to Calabrese, who was not a statutory supervisor, even though she worked more hours, for a greater percentage of her time, as a house supervisor than did Kushner.

The testimony of Merkel and Calabrese, together with an analysis of the Education Specialist job description, and a comparison with the Registered Nurse job description,[11] makes it clear that the education specialists interact to a great degree with registered nurses and much of their instruction is on-the-job assistance related to providing direct and physical patient care. In these circumstances, I find that Merkel and Calabrese have a sufficient community of interest with the nurses in the unit to be included with them. I also find that Education Specialists Vivian Bates, Toni Crane, Donna Lilla, Eileen Niedzialek, and Monica Peterson perform essentially the same functions and thus they too share a sufficient community of interest with the nurses in the unit to be included with them. I make this determination even though the evidence shows that these individuals are part of the education department, with separate supervision. The evidence shows that the head of the education department reports to the Employer's director of nursing, who is also the manager ultimately responsible for all the registered nurses in the unit. In addition, it appears that the pay of these education specialists is comparable to that of most nurses in the unit. In these circumstances, I find that Merkel, Calabrese, Bates, Crane, Lilla,

[11] The duties set forth in all three job position descriptions—Registered Nurse—Generic; Education Specialist; and Clinical Nurse Specialist—are very similar. All must be graduate registered nurses, but the Education Specialist position requires 3 years of staff nurse experience and the Clinical Nurse Specialist position requires 5 years of specialized experience. The essential job responsibilities of the Registered Nurse position, the Clinical Nurse Specialist position, and the Education Specialist position are the same. This make up 14 of the 18 responsibilities for the Education Specialist position, 14 of the 23 Clinical Nurse Specialist responsibilities and 14 of the 21 Registered Nurse responsibilities. The Education Specialist position requires the incumbent to provide educational resources and act as a consultant to nurses and other employees, to facilitate the development of skills for the staff, which includes development of continuing education programs for nursing staff and orientation process for new nurses, to provide media resources and to communicate with staff. The latter includes "making rounds and interacting with employees" and serving as "a consultant/counselor" and as a "liaison among staff, administration, and physicians." P Exh. 9. Among the specific duties in the Registered Nurse position are the following: Obtains required assessments and collects needed data; contributes to the development of a multidisciplinary plan of care, which requires collaboration with other health care providers; implements and monitors nursing intervention and evaluates the effectiveness of such intervention; provides timely and adequate teaching to patient and family; documents health care assessments; and assists with orientation and on-the-job training of new staff. P Exh. 10. The Clinical Nurse Specialist position lists job responsibilities addressed to the particular specialty or department involved, but it includes the direction of all department specific education and consultation on the specialty involved, including the assessment and improvement of the department's performance. P. Exh. 19, E Exh. 4.

Niedzialek and Peterson belong in the unit. The challenges to their ballots are overruled and their ballots should be counted.

I now turn to Kushner, Harrell and Heslop, clinical nurse specialists, who are, in some respects, part of the Education Department, but report directly to a vice-president of patient operations, who in turn reports to the Director of Nursing. The job descriptions of Kushner, Harrell and Heslop are different from the job descriptions of both the nurses and the education specialists, but the descriptions include many similarities, as shown in footnote 11 above. The clinical specialists are, as the description mentions, specialists in their fields and they perform many of the teaching functions that education specialists perform. They work with other nurses and help them provide direct and physical patient care. Harrell and Heslop did not testify, but based on their job descriptions and a comparison of the other relevant job descriptions mentioned above, as well as the relevant testimony of Kushner, I find that Harrell and Heslop also share a community of interest with the nurses in the unit and thus should be included in the unit. I therefore overrule the challenges to their ballots.

Kushner's situation is more of a close question, but, on balance, I find that she too shares a community of interest with the nurses in the unit and should be included. Her job is to act as a specialist and to provide the same teaching as the other education specialists. What causes me some difficulty is that part of her job involves teaching at a community college. The nursing students with whom she works are presumably not nurses employed by the Employer. They are not therefore part of the unit. Nevertheless, to the extent that she provides training in her specialties—medical-surgical, nurse practitioner and occupational health—to other nurses in the unit, she essentially does the same type of teaching and has the same type of interaction with unit nurses, including, with them, involvement with direct and physical patient care, as the other education specialists and the clinical specialists discussed above. It also gives me pause that Kushner apparently earns considerably more than the $30 per hour that the other education specialists earn. I do not think this alone would negate a finding of community of interest with the other employees in the unit because I think her higher salary is probably the function of her greater skills and experience. Moreover, her nurse practitioner specialty is apparently one that has been recognized by the parties as included in the unit. I therefore overrule the challenge to Kushner's ballot. Her ballot should be counted.

Clinical Coordinators Patricia Sanchez and Deborah Tomlinson

The Union challenged the ballots of Patricia Sanchez and Deborah Tomlinson on the ground that they are clinical coordinators. At the hearing, the Union contended that the challenges should be sustained both because they were supervisors within the meaning of Section 2(11) of the Act and because they did not share a community of interest with the nurses in the unit. In its brief, however, the Union relies only on the contention that they are supervisors. The Employer, in contrast, briefed both its contention that Sanchez and Tomlinson were not statutory supervisors and its contention that they shared a community of interest with the other nurses in the unit. Only two witnesses testified on this issue, Patricia Sanchez and Deborah Tomlinson. In addition, the parties introduced documentary evidence, including the clinical coordinator job description.

Patricia Sanchez has worked for the Employer as a registered nurse for about 9 years. Since May of 2006, she has served as the interim clinical coordinator for the medical acute unit at the RMC. There is no other clinical coordinator in her unit (Tr. 501, 508), and her job description is admittedly that of a clinical coordinator (Tr. 503-506, P. Exh. 8). Sanchez describes her position as "interim" because the unit's manager, a clearly supervisory position, left for another job, and, since no one has yet filled that slot, Sanchez is serving "in transition,

waiting to fill the manager's position." Tr. 502-503, 565-568. Sanchez was told that once the manager's position is filled, there will no longer be a clinical coordinator position in her unit (Tr. 567). As a clinical coordinator, Sanchez works a 40 hour week, from 8:00 a.m. to 4:30 p.m. When she assumed her position, she was a given a raise from about $26 per hour to about $31 per hour and was also given an office (Tr. 505-505, 517, 562-563).[12]

In her position as clinical coordinator, Sanchez has some kind of authority over "between thirty and forty" employees, including RNs, LPNs, and nurses' aides, many of whom, unlike Sanchez, work 12 hour shifts (Tr. 504, 516-17, 541). Sanchez insists that she is simply a "point person," as to these employees, suggesting that her immediate superior, Terri Spoltore, whose title is "Director of Medical," holds the real authority (Tr. 507-508). Spoltore, who is clearly a supervisory or managerial employee, apparently has an office in the ICU unit, but "oversees" three units, including Sanchez's unit, which apparently is located nearby the ICU unit (Tr. 507). Spoltore has frequent contact with Sanchez and physically makes rounds in Sanchez's unit twice a day (Tr. 541). According to Sanchez, she and Spoltore split the former unit manager's job duties (Tr. 568). On some matters, such as discipline and handling incident reports, she checks with Spoltore, and Sanchez simply provides Spoltore with the information for Spoltore to make a decision. Tr. 558-561. Sanchez also checks with Spoltore before approving vacation or paid time off requests for people in her unit (Tr. 556-557). On other matters, Sanchez participates with Spoltore in making decisions, but, it appears that Sanchez makes additional decisions dealing with employees in her unit without checking with Spoltore. For example, certain staffing decisions—that is, selecting which employees are scheduled to work a particular shift—is apparently done by the staffing office, although Sanchez participates with Spoltore in determining whether additional nurses are needed, a decision, which is guided, in part, by so-called staffing grids (Tr.511-513, 543). She also participates with Spoltore and other managers in so-called "bed meetings," in which decisions are made as to general nurse staffing needs (Tr. 521-523). But, thereafter, Sanchez applies those decisions to her unit. Thus, Sanchez testified that she made the daily assignments for the nurses and aides in her unit, that is, "[w]hich rooms they have for assignment." Tr. 504. Sanchez does "the assignment as far as which RN will have . . . charge over which module and which LPN will work in that module. It's like a daily assignment sheet. You have rooms 28 to 35, and then there is a resource nurse." Tr. 511. Sanchez also has the authority to transfer employees from one job to another job within her unit. Tr. 520-521. She gave an example, that is, "If we don't have a monitor tech and I have an extra LPN on the floor, staffed or right on the floor, I can make that judgment to put her on as a monitor tech, to cover the monitors." Tr. 521. She also has authority to "float" a nurse, that is, to provide a nurse from her unit to another unit that requests help. In those circumstances, Sanchez decides whether or not she can spare a nurse and whom to send (Tr. 524, 553).

Sanchez estimated that, as a clinical coordinator, 40% of her time was spent in patient care, 10% of her time was spent on performance improvement projects and 20% in following patient complaints. Tr. 547-548. She also spends one day per week in shared governance conferences, 5% of her time in management bed meetings, and another 5% researching incident reports, that is, complaints about staff errors. Tr. 548-550. She also spends about 5% of her time talking with the staffing office. Tr. 551. The remainder, she estimated, was spent in nurse education or instruction. Tr. 551-552. In that connection, Sanchez received a memo in

[12] In addition to her day-shift work as a clinical coordinator, Sanchez worked as a staff nurse on Friday nights, on a 12-hour shift, for which she was paid on a "contract rate." Tr. 526-527, 545. But it is unclear whether she continued to perform that work up until the time of her testimony in this proceeding, because, at one point in her testimony, she referred to this work in the past tense, namely, "when I was on contract." Tr. 545.

July of 2006, along with Spoltore and other managers—addressed to RMC managers—regarding compliance with certain hygiene standards. The memo asked Sanchez and the others to "pass this information on to your staff and at staff meetings." P. Exh. 16. Sanchez admitted that, in this respect, for educational purposes, she was acting as a manager (Tr. 570).

The other clinical coordinator who testified, Deborah Tomlinson, has worked for the Employer for 30 years. Since August of 2004, she has been the sole clinical coordinator in charge of the Endoscopy Department at RMC. The department is open five days a week, Monday through Friday. Tomlinson, who is salaried and earns about $70,000 per annum, oversees the day to day operation of the department, sets up the schedule for the department and makes assignments for the roughly 14 RNs, LPNs and other staff in the department (Tr. 674-676, P. Exh. 21). She does not have an office (Tr. 700). Unlike the other staff in her department, Tomlinson does not normally carry a regular patient load, that is, a scheduled patient load (Tr. 691-692). Tomlinson's duties include the assignment of nurses and aides to particular rooms in the department. As she testified, based on a schedule of "what doctors have what procedures in what rooms," Tomlinson assigns "both an RN and a scrub to the rooms" and assigns the other people "to either the cleaning rooms or the central core." Tr. 695-696. Although normally the assignments are made on a rotation basis (Tr. 697), if any changes are to be made in the assignments, she is the one who makes those changes (Tr. 690). There is no evidence that she consults anyone else before making such decisions and her judgment is based on such considerations as whether an RN or a scrub should be assigned (Tr. 697). She approves paid time off for her staff, including vacations, and she is responsible for preparing elaborate annual evaluations of her staff (Tr. 676-684, P Exh. 22-24). According to Tomlinson, those evaluations are not used for pay raises and are submitted to her superior for further processing (Tr. 702-703).

Tomlinson also has the authority to call an off-duty nurse into work and thus also to authorize premium pay for that nurse, as well as the authority to request staff from other units if she determines that additional staff is needed. She is also authorized to "float" a nurse out of her department and into another unit in Surgical Services and she is the one who decides which nurse to "float." She has exercised her authority in this respect, based on her judgment of needs, and there is no evidence that she checks with her superiors before she does so (Tr. 692-695, 700-701, 706). Tomlinson also monitors the attendance and tardiness of staff and resolves disputes between them (Tr. 686-688). She also has input for the needs of her department in the budget process, providing the requisite information to her immediate superior, Doug Lamont, the Director of Surgical Services. Lamont is in overall charge of five other departments, in addition to the Endoscopy Department (Tr. 684-685, 690-691). When Tomlinson is on leave, she selects a registered nurse on her staff to fill in for her while she is on leave (Tr. 705). According to Tomlinson, most of her average day is spent working with or interviewing patients; another significant portion is addressed to scheduling patients for the next day (Tr. 698-700).

The Clinical Coordinator's job description lists the usual nursing responsibilities, but also lists additional ones that reflect the position's responsibilities in overseeing the work of the staff. It is clear from the job description that the clinical coordinator heads and is responsible for the work in the department to which she is assigned. For example, the coordinator is responsible for implementing and monitoring nursing interventions, including delegating, monitoring and evaluating care "being delivered by ancillary nursing staff." The coordinator is also responsible for integrating department services with the "Hospital's Primary Function," including "completion of projects and timely implementations." The coordinator coordinates and integrates services with his or her department, and with other departments and organizations, including "represent[ing] department throughout South Jersey Hospital." The coordinator also is charged with developing and implementing policies and procedures that guide and support the provision

of services, including specifically "supervis[ing] and evaluat[ing] staff in the provision of services." The coordinator also "ensures sufficient staff to meet patient needs" assesses and improves the department's performance, provides orientation, training and continuing education and maintains appropriate quality control programs. P. Exh. 8. Tomlinson's testimony was generally in line with the job description, but Sanchez seemed to resist equating her duties to her job description, tending to answer that, in many cases, she did not have the authority set forth in the job description. I found Sanchez to be less candid than Tomlinson in describing her duties, in part, I believe, because she was only in the job on an interim basis and had been in the position only for a few months when she testified. Although on the more crucial issues, for example, the assignment of employees in their departments, their testimony was essentially mutually corroborative, to the extent that there differences, I believe Tomlinson's testimony on the job functions of the clinical coordinators was probably more reliable, not only because of her greater experience in the job, but because it was more in line with the job description. In any case, I rely in my findings primarily on the testimony of the witnesses rather than the language in the job description.

Section 2(11) of the Act defines "supervisor" as

> Any individual having the authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In its recent decision in *Oakwood Healthcare, Inc.,* 348 NLRB No. 37 (2006), the Board analyzed its application of the definition to particular situations, restating certain principles and clarifying others. It reaffirmed that possession of any one of the listed functions renders the individual a supervisor and that the party alleging supervisory status bears the burden of proving such status. Slip op. 2-3. The Board also clarified its construction of the terms "assign," "responsibly direct," and "independent judgment." The term "assign" is of particular significance in this case since the Union mainly relies on evidence of their authority to assign work to prove the supervisory status of Sanchez and Tomlinson.

In *Oakwood,* the Board construed the term "assign" as referring to the act of "designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee." Slip op. 4. In applying its construction to the facts before it in *Oakwood*, the Board found that certain charge nurses involved in that case were supervisors because they assigned nursing personnel to patients and to specific geographic locations, like a "particular place." Slip op. 10. In construing the term "independent judgment," which the Board affirmed is a requirement for each of the functions set forth in Section 2(11) (slip op. 7), the Board does not find supervisory status if determinations are made in accordance with company policies or instructions, but does so if the policies "allow for discretionary choices." Those choices must involve a degree of discretion that rises above the "routine or clerical." Slip op. 8. Nor does professional judgment enter into the equation. As the Board stated, even if a charge nurse makes the professional judgment that a particular patient requires a certain degree of monitoring, he or she is "not a supervisor unless and until he or she assigns an employee to that patient . . . ." Slip op. 9. In applying its construction of "independent judgment" in the case before it, the Board distinguished between charge nurses who made assignments based on the skill, experience, and temperament of the other nursing personnel, and the acuity of the patients, as opposed to those—those in the emergency room—who did not (Slip op. 10-14).

Thus, as the Board stated, if a charge nurse "makes an assignment based upon the skill, experience, and temperament of other nursing personnel and on the acuity of the patience, that charge nurse has exercised the requisite discretion to make the assignment a supervisory function 'requir[ing] the use of independent judgment.'" Slip op. 13. See also *Golden Crest Healthcare Center*, 348 NLRB No. 39 (2006) (Slip op. 4 fn. 9).

Applying those principles to the facts in this case, I find that even if the Union has proved that Clinical Coordinators Sanchez and Tomlinson have the authority to assign nurses and staff in their departments, it has not shown they use independent judgment in utilizing that authority. They are thus not supervisors within the meaning of the Act. Nor does the record show that the coordinators possess any other statutory indicia of supervisory status, using independent judgment. The record on this issue is somewhat sparse and not as focused as it would have been had the matter been litigated after the issuance of the Board's decision in *Oakwood Healthcare*. Nevertheless, I must go with what I have.

The evidence shows that Tomlinson has the authority, which she exercises, to assign nurses to particular locations and tasks in her department. She assigns employees to particular rooms. For example, she assigns some people to "the cleaning rooms or the central core." Although the assignments are initially made on a rotation basis, she can change those assignments if necessary. She also has the authority to call an off-duty nurse into work and to pay the nurse premium time to do so. And she has the authority, without consulting a superior, to float a nurse out of her department and into another and to choose the nurse who is floated to based on her judgment of needs. She also selects her substitute when she is on leave. Sanchez likewise has the authority to assign employees to particular tasks and locations. She assigns particular nurses to particular "modules," and "rooms." She can also reassign employees to particular jobs in her unit; she makes the "judgment to put [the nurse] on as a monitor tech." She likewise has the authority to float a nurse to another unit and to select the particular nurse to be floated. Sanchez testified very clearly that she checked with her superior on a number of decisions she makes, but she pointly did not testify that she checked with her superior on these assignment decisions. In *Golden Crest Healthcare, supra*, slip op. 3-4, the Board refined its view of the assignment authority that leads to a supervisory finding. I shall assume arguendo that the assignment authority in this case satisfies the Board's requirement, in *Golden Crest Healthcare*, that the putative supervisor must have the ability to require rather than to request nurses to stay beyond their shift or come in from home, must do something more than balance workloads and have the authority to require nurses to change their work assignments.

Despite my findings concerning the assignment decisions made by Tomlinson and Sanchez, I cannot find that they were based on their use of independent judgment that rises above the "routine or clerical." There is no evidence at all in this record on what actuated their judgment in making the assignments mentioned above, even though Sanchez and Tomlinson made those assignments without consulting their superiors. I do not read *Oakland* to permit me to infer independent judgment simply from the fact the decision is made based on the putative supervisor's judgment or simply because it is made without checking with his or her superior. There must be some evidence that the assignment is based upon an assessment by the putative supervisor of the skill, experience, and temperament of the person assigned and the acuity of the patient. Such evidence is missing here. Nor is there any evidence that such decisions are based on considerations that rise above the "routine or clerical." Indeed, the lack of evidence on independent judgment in this case extends to any other function listed in Section 2(11) that either Sanchez or Tomlinson may have displayed. Obviously, the lack of evidence on independent judgment works against the Union, which has the burden of proof on this issue. In

these circumstances, I find that Tomlinson and Sanchez are not supervisors within the meaning of the Act. Accordingly, the challenges to their vote are overruled.[13]

In its brief (Br. 60-62), the Union urges me to make a finding that all clinical coordinators are supervisors within the meaning of the Act and to find that all individuals with that title should be deemed ineligible to vote. I do not believe I have the authority to make such a ruling. First of all, I am authorized only to determine whether the Union's challenges to the ballots of Sanchez and Tomlinson should be sustained. No other clinical coordinator challenges were presented to me; indeed, one challenge to an alleged clinical coordinator was withdrawn and another turned out to involve someone (Karen Kushner) who was not a clinical coordinator. In addition, as I have indicated above, on the evidence presented to me on the Sanchez and Tomlinson challenges, I did not find those clinical coordinators to be supervisors within the meaning of the Act. Since the evidence did not support the Union's position on Sanchez and Tomlinson, it would not, perforce, be sufficient for the broader finding suggested by the Union.

To summarize my determinations on the challenged ballots, Jost, Jeffries, Kushner, Sanchez, Tomlinson, Bates, Calabrese, Crane, Harrell, Helsop, Lilla, Merkel, Niedzialek, and Peterson are eligible to vote and their votes should be counted; Chew, Moore, Hitchon and Conicello are not eligible to vote and their votes should not be counted.

Conclusions and Recommended Order

In accordance with the above findings, I conclude that the election was valid and I order that the Regional Director open and count the challenged ballots of Yolanda Jost, Denise Jeffries, Karen Kushner, Patricia Sanchez, Deborah Tomlinson, Vivian Bates, Cynthia Calabrese, Toni Crane, Nancy Harrell, Patricia Helsop, Donna Lilla, Margaret Merkel, Eileen Niedzialek, and Monica Peterson, and issue a final tally and an appropriate certification.[14]

Dated at Washington, D.C., November 1, 2006.

Robert A. Giannasi
Administrative Law Judge

[13] Here again, the Union has not renewed in its brief the alternative contention made at the hearing that even if Sanchez and Tomlinson are not supervisors they nevertheless lack a sufficient community of interest with the nurses in the unit to be included with them. The Employer does address this alternative contention in its brief. As I have indicated above, I feel bound to address the issue. Accordingly, I also find that Sanchez and Tomlinson have a sufficient community of interest with the other nurses in the unit to be included in the unit. They interact with other nurses and a substantial part of their work is direct patient care, including helping nurses in their physical care of patients.

[14] Pursuant to the provisions of Section 102.69 of the Board's Rules and Regulations, within 14 days from the date of issuance of this recommended decision and order, either party may file with the Board in Washington, D.C. an original and eight copies of exceptions thereto. Immediately upon filing such exceptions, the party filing them shall serve a copy upon the other parties and a copy with the Regional Director. If no exceptions are filed to this decision and recommended order, the Board may adopt the decision and order as its own.